

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

IN RE:	)	CHAPTER 13
	)	
MARY KAY PULLEN,	)	CASE NO. 11-81588 - MHM
	)	
Debtor.	)	

**ORDER *GRANTING* DEBTOR'S MOTION TO VACATE  
AND  
*DENYING* CREDITOR'S MOTION TO ANNUL STAY**

This case commenced October 31, 2011, in order to prevent a foreclosure sale scheduled for November 1, 2011, by Cain V. Harris ("Harris"), who holds the first mortgage on Debtor's real property located at 330 Jade Cove Drive, Roswell, Georgia (the "Property"). On November 1, 2011, Harris filed an emergency motion for relief from the automatic stay of §362(a) to permit him to cry out the foreclosure sale but not to record the Deed Under Power ("DUP") until further order of this court (Doc. No. 5) (the "Emergency Motion"). The Emergency Motion was granted by order entered November 1, 2011 (the "Emergency Order"). On November 2, 2011, Debtor filed a motion to vacate the Emergency Order (Doc. No. 19). On November 3, 2011, Harris filed a motion to validate the foreclosure sale and annul the automatic stay (Doc. No. 20). Hearing on Debtor's motion and Harris' motion was held November 22, 2011.

To expeditiously handle the frequent emergency motions filed by creditors on foreclosure day,<sup>1</sup> the undersigned has formulated a summary procedure for a creditor to obtain an emergency order allowing the creditor only to cry out the foreclosure sale but not to record the DUP without further order of the bankruptcy court. Under §102, the notice provided prior to granting the extremely limited relief, which is granted only if creditor makes a *prima facie* showing of multiple prior cases or a prior dismissal under §109(g), is reasonable when balanced against the irreparable harm of not allowing the month-long advertised foreclosure sale to proceed, requiring the creditor to renotice and re-advertise and suffer delay of at least another month. In the emergency motion, the creditor must certify that he has given notice or attempted to give notice of the emergency motion to the debtor by telephone, in person, by hand delivery, by fax, or by other specified means, such as email. If, as in the instant case, it is later discovered that adequate notice was not given or that some other fact alleged in the motion was incorrect, or if the creditor fails to file the

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<sup>1</sup> In Georgia, non-judicial foreclosure sales may take place on the courthouse steps once monthly on the first Tuesday of each month (“foreclosure day”). The creditor must have provided proper notice to the borrower and must have advertised the intended foreclosure sale in the county’s organ for such legal notices for four consecutive weeks immediately before the foreclosure sale. If the foreclosure sale does not take place on the appointed day, the creditor must begin the whole notice and advertisement process again. The foreclosure day for November 2011 was November 1, 2011. The emergency motions by creditors are usually prompted by a debtor, in order to utilize the automatic stay to stop a foreclosure sale, filing a bankruptcy case very close in time to the scheduled foreclosure sale, typically the day before or the day of the scheduled foreclosure sale.

required follow-up motion to validate the foreclosure and annul the automatic stay, then the foreclosure sale is rendered void.

In the instant case, the Emergency Motion was accompanied by a certificate of service in which Harris' attorney certified that he had provided notice of the motion to Debtor's attorney by email. The Emergency Order, which was prepared by Harris' attorney, recited that notice had been provided to Debtor's attorney by email. In later pleadings filed by Harris and on the record at the hearing, Harris' attorney admitted that he, in fact, forgot to send the email to Debtor's attorney. Harris argued, however, that the electronic notice provided by the court's CM-ECF system provided Debtor's attorney with adequate notice of the Emergency Motion. Debtor's attorney showed, however, that the electronic notice of the Emergency Motion that he actually received was transmitted a few minutes after midnight November 2, 2011.<sup>2</sup>

Due process requires notice reasonably calculated to apprise interested parties of the pendency of the action. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The litigants in this proceeding have a long history involving the Property and Debtor's current attorney has apparently continuously represented


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<sup>2</sup> Harris was apparently under the mistaken impression that authorized users of the court's CM-ECF electronic filing system always receive instant electronic notice of pleadings filed. If, however, a CM-ECF authorized user regularly appears in many bankruptcy cases, the user may elect to receive summary electronic notice in which electronic notice of all pleadings filed is sent in a single email at the end of the day. Obviously, this option is routinely elected by attorneys who seek to avoid receiving hundreds of separate emails daily.

Debtor for several years. Harris' attorney is very well aware of that representation and had, in fact, engaged in communications with Debtor's attorney over several months immediately prior to the Emergency Motion. Although more than one means of virtually instant communication was available to Harris' attorney to apprise Debtor's attorney of the filing of the Emergency Motion, no such notice was provided. As a result Debtor was deprived of due process and the relief sought by Harris cannot be granted. Accordingly, it is hereby

**ORDERED** that the Emergency Order entered November 1, 2011 (Doc. No. 10) is *vacated*. Harris' motion to validate the foreclosure sale and annul the stay is *denied*.

**IT IS SO ORDERED**, this the 23d day of November, 2011.

  
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MARGARET H. MURPHY  
UNITED STATES BANKRUPTCY JUDGE